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No. 88-155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF TEXAS, *Petitioner*,

—v.—

GREGORY LEE JOHNSON, *Respondent*.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

James C. Harrington
(Counsel of Record)
Kerry McGrath
Texas Civil Liberties Union
Foundation
1611 East First Street
Austin, Texas 78702-4455
(512) 477-5849

Stanley I. Weinberg
7509 Inwood Road, Suite 300
Dallas, Texas 75209
(214) 747-1232

Steven R. Shapiro
John A. Powell
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

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Respondent submits this brief in opposition to the petition for a writ of certiorari filed by the Dallas County District Attorney,[1] which seeks review of the judgment entered in this action by the Texas Court of Criminal Appeals on April 20, 1988.

STATEMENT OF THE CASE

Respondent peacefully burned an American flag during a political demonstration in front of the Dallas City Hall on August 22, 1984. He was convicted and sentenced to one year in confinement and a

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1/ Neither the Texas Attorney General, nor the State Prosecuting Attorney who represented the state in the Court of Criminal Appeals, chose to file a petition for certiorari in this case. The Dallas County District Attorney, who filed the petition for certiorari, was formerly a judge on the Dallas Court of Appeals. In that capacity, he wrote a decision in this case upholding respondent's conviction that was later reversed by the Texas Court of Criminal Appeals.

$2,000 fine under Texas Penal Code §42.09, which prohibits desecration of a state or national flag by "defac[ing], damag[ing] or otherwise physically mistreat[ing]" it in a manner the actor knows will "seriously offend" one or more observers. His conviction was subsequently vacated by the Texas Court of Criminal Appeals on First Amendment grounds.

Petitioner's Statement of the Case is largely devoted to describing events that are not germane to the legal question presented. On the relevant legal issue, petitioner is unable to point to any evidence in the record indicating that respondent's decision to burn the flag created unrest or the imminent likelihood of unrest. Indeed, petitioner's elaborate recitation of the day's activities cannot obscure the simple fact that the only

charge ever brought against respondent was flag desecration; he was not charged with any act of vandalism or breach of the peace.

The context in which respondent's action took place highlights its political nature. The flag burning occurred during one of many demonstrations held in Dallas during the 1984 Republican National Convention. In addition to respondent's act of political protest, the demonstration included speeches opposing the policies of the Reagan administration, symbolic "die-ins" designed, as petitioner observes, "to represent the force and effect of a nuclear bomb explosion," Pet. at 6, and the peaceful flag burning at City Hall.

Upon reviewing the evidence at respondent's trial, the Texas Court of Criminal Appeals held: "The act for which

[respondent] was convicted was clearly 'speech' contemplated by the First Amendment." Applying well-settled First Amendment principles, the court then concluded that respondent's conviction could not stand:

> Recognizing that the right to differ is the centerpiece of our First Amendment freedoms, a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to present.

App. at 19-20.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW CORRECTLY APPLIED THIS COURT'S FIRST AMENDMENT STANDARDS

In reviewing the propriety of respondent's conviction, the Texas Court of Criminal Appeals faithfully applied the decisions of this Court and reached a conclusion that is entirely consistent with the judgment of other courts facing similar issues. See Point II, infra. Petitioner's attempt to create a sense of legal uncertainty is, therefore, without basis.2/

2/ It is worth noting that if this Court were to reverse the decision of the Texas Court of Criminal Appeals, the appropriate course would be to remand the case to the state court to consider whether the Texas Constitution would afford respondent's expression greater constitutional protection than the federal Constitution. As the Texas Court of Criminal Appeals explained, it did not decide whether the Texas Constitution requires a reversal of Johnson's conviction because it is that court's procedure "to review the correctness of the Court of Appeals' application of federal law and then remand, if necessary, for a determination of the state law issues." App. at 7, n.6.

The decision below rests on four legal premises, each of which is disputed by petitioner but each of which is grounded in well-settled constitutional doctrine.

First, petitioner challenges the conclusion below that this case involves symbolic political speech. That conclusion, however, is clearly supported by this Court's decision in Spence v. Washington, 418 U.S. 403 (1974).[3/] Here, as in Spence, "there can be little doubt that [respondent] communicated through the use of symbols." Id. at 410. Here, as in Spence, respondent plainly intended "to convey a particularized message . . . and in the surrounding circumstances the likelihood

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3/ The defendant in Spence was arrested for placing a peace symbol over an American flag, which he then hung from his window. This Court reversed, noting the "communicative connotation of the use of flags." 418 U.S. at 410.

was great that the message would be understood by those who viewed it." Id. at 411. And here, as in Spence, respondent's activity, "combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression." Id. at 410.

Second, petitioner disagrees with the level of scrutiny applied by the Texas Court of Criminal Appeals. Even assuming that respondent's conduct represented symbolic political speech, petitioner argues that only intermediate scrutiny is required by this Court's decision in United States v. O'Brien, 391 U.S. 367 (1968). Once again, that very same argument was made and rejected in Spence. Commenting on the state's asserted interest in preserving a symbol of national unity -- precisely the

argument advanced by petitioner -- this Court observed:

> If this interest is valid, we note that it is directly related to expression in the context of activity like that undertaken by appellant. For that reason, and because no other governmental interest unrelated to expression has been advanced or can be supported by this record, the four-step analysis of United States v. O'Brien is inapplicable.

418 U.S. at 414 n.8 (citation omitted).4/

Third, petitioner contends that its interest in preventing a breach of the peace is sufficient to warrant restricting respondent's symbolic expression. However, the Texas court correctly applied the standard of Brandenberg v. Ohio, 395 U.S.

4/ In this case, petitioner has asserted the additional interest in preventing a breach of the peace. That interest is also speech-related, at least as articulated by petitioner, since it was entirely based on anticipated hostility to the political message conveyed by respondent's flag-burning.

444 (1969), when it concluded that "there was no breach of the peace, nor does the record reflect that the situation was potentially explosive." App. at 13. As this Court has repeatedly held, unless an action is both "directed to inciting or producing imminent lawless action" and is "likely to incite or produce such action," 395 U.S. at 447, the state's interest in preventing a breach of the peace cannot justify abridging First Amendment rights.

Indeed, this Court has rejected the theory that expression may be suppressed based on unsubstantiated predictions of a breach of the peace. See Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 508 (1969)("in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"). As the Texas court recog-

nized, "[o]ne cannot equate [the statute's reference to] 'serious offense' with incitement to breach the peace." App. at 13. An imminent and likely breach of the peace is what this Court has required before speech may be suppressed in the interests of social tranquility.

Both in this Court and below, petitioner has contended that flag burning is so inherently inflammatory that a breach of the peace may be presumed. Petitioner ignores the fact that no breach of the peace occurred in this case, cf. NAACP v. Claiborne Hardware, 458 U.S. 886, 929 (1982), and that the lower courts have often reviewed acts of flag desecration unaccompanied by even a threat of violence.5/

5/ See, e.g., Spence, 418 U.S. at 409 ("the record is devoid of proof of any risk of breach of the (continued...)

Finally, petitioner argues that the court below was wrong in discounting the state's interest in preserving the flag as a symbol of national unity -- an interest that petitioner apparently believes is sufficient to prohibit any attack on the flag.6/ While it may be true that this Court has never resolved that question in precisely this form, it is equally true that this Court has often indicated in

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5/ (...continued)
peace"); Jones v. Wade, 479 F.2d 1176, 1180 (5th Cir. 1973)("there is no indication that his actions ever provoked violence or public disorder . . . and it is questionable whether mutilation of any and all such symbols [i.e. flags], or imitations thereof, would be so likely to provoke public disorder or outrage as to furnish legitimate grounds for state regulation"); Monroe v. State Court of Fulton County, 739 F.2d 568, 575 (11th Cir. 1984)("there was no evidence demonstrating the likelihood and imminence of public unrest").

6/ Petitioner's view does not contain any self-limiting principle. It would appear to bar even critical comments about the flag, a position that is directly contrary to this Court's holding in Street v. New York, 394 U.S. 576 (1969).

related contexts that the nation's choice of symbols cannot be forced on its citizens. As this Court stated in its memorable opinion in West Virginia Board of Education v. Barnette, 319 U.S. 624, 632-33 (1943), "[a] person gets from a symbol the meaning he puts into it . . ." More recently, this Court noted in Street v. New York:

> We have no doubt that the constitutionally guaranteed "freedom to be intellectually . . . diverse or even contrary," and the "right to differ as to things that touch the heart of the existing order," encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous.

394 U.S. 576, 593 (1969)(quoting Barnette, 319 U.S. at 641-42).7/

7/ The Eleventh Circuit reaffirmed that these fundamental principles of freedom of expression and (continued...)

Withdrawing the flag from public discourse would invite the withdrawal of other focal points of dissent. In recognition that such a step is constitutionally unacceptable, the Texas court made the only determination it could have made in this case: peaceful expression of opinion, whether by symbols or otherwise, may not be suppressed. The doctrine of this Court and of the federal Courts of Appeals supports

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7/ (...continued)
opinion prohibit the state from punishing peaceful acts of flag burning. Monroe, 739 F.2d 568. Relying primarily on Barnette, the Eleventh Circuit held:

> The government has no legitimate interest in compelling an individual to express respect for the flag and what it symbolizes . . . . There is no significant difference between Barnette, in which the government sought to compel the expression of respect toward the flag and this case, in which the government seeks to prevent the expression of disrespect.

739 F.2d at 574 (emphasis in original).

that result. Petitioner has presented no reason warranting review by this Court.

II. PETITIONER HAS NOT IDENTIFIED A CONFLICT AMONG THE CIRCUITS OR THE STATES' HIGHEST COURTS ON THE RELEVANT LEGAL QUESTION

Petitioner's brief fails to identify any current conflict in the lower courts on the First Amendment standards applicable to governmental restrictions on flag burning. Since this Court's decision in Spence, a practical consensus has developed among the lower courts, and that consensus is consistent with the result reached below by the Texas Court of Criminal Appeals.

Respondent is aware of at least four cases since Spence that have reversed criminal convictions for violating flag

desecration statutes.[8/] In each instance, these courts have relied on First Amendment principles established by this Court to arrive at the common conclusion that an individual cannot be penalized for peacefully burning, misusing, or otherwise desecrating a flag as a symbolic political statement. Those cases support the decision below and respondent's position here that the doctrinal question petitioner presents has already been resolved.

In Monroe v. State Court of Fulton County, 739 F.2d 568, the Eleventh Circuit reversed the conviction of a flag-burning

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8/ Respondent is aware of only one post-Spence decision that has upheld a criminal conviction under these circumstances. See Kime v. United States, 673 F.2d 1318 (4th Cir. 1982), cert. denied, 459 U.S. 949 (1982). However, as Justice Brennan noted in dissenting from the denial of certiorari, the lower courts in Kime failed even to address the applicability of Spence. Id. at 954, n.4.

protester who had been prosecuted under a Georgia flag desecration statute. The Monroe court held that the state's interest in protecting the flag as a symbol of the nation could no more justify suppression of the nonverbal flag desecration in the case before it than it could justify suppression of the verbal desecration of the flag at issue in Street, or compulsion of the respectful salute at issue in Barnette. Monroe, 739 F.2d at 574. See also Bowles v. Jones, 758 F.2d 1479 (11th Cir. 1985) (following Monroe to reverse conviction of protester for burning flags at anti-imperialism demonstration).

Similarly, in Cline v. Rockingham County Superior Court, 502 F.2d 789 (1st Cir. 1974), the First Circuit affirmed the grant of a writ of habeas corpus on the ground that "[t]he recent Supreme Court

decision in Spence v. Washington . . . has made it clear that the [flag abuse] statute was unconstitutionally applied to petitioner Cline's activity in the instant case." Id. at 790 (citation omitted). Finally, in United States ex rel. Radich v. Criminal Court of New York, 385 F.Supp. 165 (S.D.N.Y. 1974), the court granted a writ of habeas corpus to reverse the conviction of the proprietor of an art gallery who had been prosecuted for "casting contempt" on the flag by possessing sculptures partly composed of American flags. This judicial consensus is adequate to guide any state or federal court confronting the question that petitioner unnecessarily seeks to present to this Court in this case.

In an effort to create the appearance of unsettled law, petitioner relies on a

series of decisions that predate this Court's opinion in Spence.[9/] See, e.g., Pet. at 19-20, 27, 33-35, 43-46. Petitioner does not and cannot contend that the law in this area is any longer unsettled, and indeed it is not.

III. EVEN IF THE QUESTION PRESENTED WERE NOT ALREADY SETTLED, THIS CASE IS AN INAPPROPRIATE VEHICLE FOR REVIEW BECAUSE THE TEXAS STATUTE IS BOTH ATYPICAL AND PLAINLY UNCONSTITUTIONAL

Even if this Court were to decide that the question presented by petitioner is not settled, it should not address it in this case because respondent was convicted under an unusual flag-desecration statue, the wording of which raises special constitutional problems. The added layer of con-

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9/ Judge Miller's dissent from the decision of the Court of Criminal Appeals similarly relied on cases that are no longer good law.

stitutional difficulty presented by this case would require invalidation of the Texas statute even were the Court to determine that the burning of a flag at a political demonstration is not necessarily protected speech.

The Texas statute under which Johnson was convicted defines prohibited flag desecration not only as defacing, damaging or otherwise mistreating a flag, but also as doing so "in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." Tex. Penal Code §42.09(b). In this respect, the statue is unlike most flag-desecration and flag-use restrictions, which commonly describe the prohibited

conduct itself, independent of what onlookers might think of it.10/

Defining the prohibited conduct in terms of the offense that others might take to it amounts to an unconstitutional "heckler's veto." As this Court explained in Street, 394 U.S. at 592, "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are

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10/ See, e.g., 18 U.S.C. §700 (United States statute prohibiting "knowingly casting contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning or trampling upon it"); Monroe, 739 F.2d 568 (reviewing Georgia statute providing that "[a] person who deliberately mutilates, defaces or defiles the flag of the United States . . . is guilty of a misdemeanor"); Cline, 502 F.2d 789 (reviewing New Hampshire statute prohibiting alteration of, or display of altered, United States flag); Radich, 385 F.Supp. 165 (reviewing New York statute providing that "any person who . . . [s]hall publicly mutilate, deface, defile or defy, trample upon or cast contempt on [the flag] either by words or act . . . [s]hall be guilty of a misdemeanor").

themselves offensive to some of their hearers." Thus, even if the Court were to hold that the state has asserted interests sufficiently strong to override respondent's First Amendment right to burn a flag in political protest, the state would not be free to invite onlookers to be the ones to decide when respondent's speech should be curtailed.

Basing the permissibility of expression on whether it will "seriously offend" observers is also unconstitutionally vague. A statute that criminalizes conduct in terms so vague that an average citizen must guess at the meaning of those terms violates due process. See Grayned v. City of Rockford, 408 U.S. 104, 108 (1974). The constitutional requirement that a statute clearly delineate what conduct it forbids has special urgency where, as here, the

statute's lack of clarity threatens to chill protected speech. See Smith v. Goguen, 415 U.S. 566, 573 (1974). In this case, the inevitable consequence of the state's failure to define clearly what conduct is deemed seriously offensive is that individuals will steer wide of even potentially prohibited conduct by avoiding all conduct disrespectful of the flag in the fear that it might cause some observer a degree of displeasure that could, conceivably, be described as serious offense. When a vaguely worded statue chills individuals' expression in this way, it causes them to sacrifice more expressive activity than the state constitutionally can impair.11/

11/ For this reason, it also creates substantial overbreadth problems, see Houston v. Hill, 107 S.Ct. 2502 (1987), as the Texas Court of Criminal Appeals properly recognized in its opinion below. App. at 16.

CONCLUSION

For the reasons stated herein, the petition for certiorari should be denied.

Respectfully submitted,

James C. Harrington
(Counsel of Record)
Kerry McGrath
Texas Civil Liberties
Union Foundation
1611 East First Street
Austin, TX 78702-4455
(512) 477-5849

Stanley I. Weinberg
7509 Inwood Road,
Suite 300
Dallas, TX 75209
(214) 747-1232

Steven R. Shapiro
John A. Powell
American Civil Liberties
Union Foundation
132 West 43 Street
New York, NY 10036
(212) 944-9800

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